In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-72

CLYDE FITCH AND SHARON FITCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Clyde Fitch received number 309 in the November 1969 national draft lottery. The number, as later events revealed, was sufficiently high to exempt him from military service. However, a transcription error at his local draft board resulted in the recording of his number as 132, and Fitch was subsequently drafted into the United States Army. One year later the processing error was discovered by the Selective Service System during a routine audit. Fitch was discharged from active duty three months thereafter (Pet. App. A-2).

After Fitch's discharge, petitioners brought this suit under the Federal Tort Claims Act seeking both compensatory and punitive damages. The district court found the government negligent and awarded petitioners $11,661 in compensatory damages and $20,000 in punitive damages (Pet. App. A-6 to A-12). The court of appeals reversed (Pet. App. A-1 to A-5), holding that petitioners' complaint arose out of a negligent misrepresentation and hence was

not a claim cognizable under the Tort Claims Act because of the specific exception for claims of "misrepresentation" provided in 28 U.S.C. 2680(h).[1] The court further held that the district court's award of punitive damages was improper in view of the express bar against such awards in 28 U.S.C. 2674.

2. In *United States* v. *Neustadt*, 366 U.S. 696, this Court held that neither negligent nor intentional misrepresentations by the United States are actionable under the Federal Tort Claims Act. The Court further held that this bar cannot be circumvented through allegations of negligence when the gravamen of the complaint is misrepresentation. The instant case arose out of the alleged negligent misrepresentation to Fitch by his draft board of his obligation to enter the Army. The court of appeals thus correctly determined that the Act afforded petitioners no remedy.

Petitioners argue (Pet. 9-10), however, that the misrepresentation exception is applicable only to cases involving transactions of a business or financial character. While it is true that the facts of *Neustadt*—an appraisal by the F.H.A. of real property—involved a subject matter of a commercial nature, this Court did not hold that the misrepresentation exception is confined to cases where the complaint arises out of a business transaction. Petitioners appear to rest their argument upon the last footnote in *Neustadt*, where the Court noted that Dean Prosser, in the 1941 edition of his

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[1]28 U.S.C. 2680(h) excludes from the coverage of the Act "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

treatise on torts, had observed that " '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings' " (366 U.S. at 711, n. 26). But the purpose of that footnote was simply to clarify that the "misrepresentation" exception did not immunize the government from the type of negligence claim presented in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (involving the Coast Guard's failure to maintain navigational aids). Accordingly, the lower federal courts, in decisions subsequent to *Neustadt*, have not read the misrepresentation exception as applying only to business dealings. For example, in *Reamer* v. *United States*, 459 F.2d 709, the Fourth Circuit denied recovery for an alleged breach of a military enlistment contract on the ground that, to the extent the case sounded in tort, it fell within the misrepresentation exception of Section 2680(h). And in *DeLange* v. *United States*, 372 F.2d 134, the Ninth Circuit found a physician's communicated misdiagnosis also to be a misrepresentation within the meaning of the statute.

But even if the misrepresentation exception of the Act were to be confined solely to interests of a commercial character, petitioners' complaint nevertheless would be barred by the false imprisonment exception of Section 2680(h).[2] The gravamen of petitioners' complaint is that

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[2]Prosser describes the tort of false imprisonment in the following terms (Prosser, *The Law of Torts* §12, p. 57 (1964 ed.)):

> The restraint may be by means of physical barriers, or by threats of force which intimidate the plaintiff into compliance with orders. It is sufficient that he submits to an apprehension of force reasonably to be understood from the conduct of the defendant, although no force is used or even expressly threatened.

the United States wrongfully deprived Fitch of "his freedom to come and go as he chose" (Pet. App. A-11). That allegation states a claim of false imprisonment with respect to which the United States has not waived its sovereign immunity.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[3]Moreover, even if Fitch's claim were cognizable under the Federal Tort Claims Act, his recovery, as the government argued in the courts below, should be barred by his own contributory negligence. Fitch testified that he watched the lottery drawing on television, and knew that it affected him; he knew that there were only 365 numbers and that he received number 309 (Court of Appeals Appendix, which we are lodging with the Clerk, pp. 50-51). Nevertheless, he never questioned his being called by his draft board even though there were public announcements that no one holding a number above 240 would be taken. But for his own negligent failure to bring this error to the attention of his draft board, Fitch would not have been drafted.

Petitioners further contend (Pet. 11) that after the discovery of Fitch's wrongful induction the United States failed to discharge him speedily from active duty. But petitioners failed to raise this issue in the court of appeals and therefore are precluded from raising it here. *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, decided April 28, 1975, slip op. 28; *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 96, n. 9; *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312.